80-1714

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ALEXANDER L. STEVAS,
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No._____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

ROBERT G. BRITTON, Commissioner,
Alabama Department of Corrections, and
JOSEPH OLIVER, Warden, Holman Prison,

Petitioners

v.

JOHN LOUIS EVANS, III,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

CHARLES A. GRADDICK
ATTORNEY GENERAL OF
ALABAMA

EDWARD E. CARNES
ASSISTANT ATTORNEY GENERAL
OF ALABAMA

Counsel of Record

250 Administrative Building
64 North Union Street
Montgomery, Alabama 36130
(205) 834-5150

ATTORNEYS FOR PETITIONERS

QUESTIONS PRESENTED

1. Does Beck v. Alabama, 100 S. Ct. 2382 (1980), require the reversal of all Alabama pre-Beck capital convictions, including those in which there was absolutely no evidentiary basis for a lesser included offense instruction and in which the defendants admitted, confessed, and pleaded guilty to the capital offense?

2. In a federal habeas corpus proceeding may harm and prejudice be presumed, or must they be alleged and proven by the habeas petitioner?

3. Is a guilty plea limited in effect to being a waiver of defects in proceedings occurring prior to the plea, or does a guilty plea also conclusively establish factual guilt and render irrelevant any constitutional violations which do not stand in the way of conviction if factual guilt is established?

4. May a federal court properly refuse to certify state law questions otherwise within the rule of Bellotti v. Baird, 428 U.S. 132 (1976), on the sole ground that preemptive decision of the affected federal constitutional issues moots the state law questions?

PARTIES

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OPINIONS BELOW

1. The opinion of the United States Court for the Southern District of Alabama, denying Respondent Evans' petition for a writ of habeas corpus is reported as Evans v. Birtton,[1] 472 F. Supp. 707 (S.D. Ala. 1979), and is submitted as Appendix I, hereto, pp. 46a - 134a, infra.[2]

2. The opinion of the United States Court of Appeals for the Fifth Circuit, reversing the district court's denial of Evans' petition, is reported as Evans v. Britton, 628 F. 2d 400 (5th Cir. 1980), and is submitted as Appendix C, hereto, pp. 15a - 22a, infra.

3. The extension of the opinion of the United States Court of Appeals for the Fifth Circuit, in denying rehearing, is

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[1]The caption of the published district court opinion misspells the name of Robert G. Britton, the Commissioner of the Alabama Department of Corrections.

[2]The appendices to this petition are separately bound pursuant to Rule 21.1(k).

not yet published but is submitted as Appendix B, hereto, pp. 3a - 14a, infra.

JURISDICTION

The judgment and initial opinion of the United States Court of Appeals for the Fifth Circuit was issued on October 15, 1980. See Appendix A, p. 1a, infra, and Appendix C, p. 15a, infra. The opinion was extended and rehearing denied on March 9, 1981. See Appendix B, pp. 3a - 14a, infra.

CONSTITUTIONAL, STATUTORY, AND RULE PROVISIONS INVOLVED

1. 28 U.S.C. § 2254, which is reproduced as Appendix J, hereto, pp. 129a - 134a, infra.

2. Alabama Rule of Appellate Procedure 18, which is reproduced as Appendix E, hereto, pp. 30a - 33a, infra.

STATEMENT OF THE CASE

The Facts

In September of 1976, Respondent John Louis Evans, III, was released on parole from an Indiana prison. (Tr. 238, 321)[3] Before being released, Evans had made plans with a fellow inmate named Wayne Eugene Ritter to go on a cross-country crime spree when they got out. (Tr. 322) After leaving Indianapolis on Christmas Day, 1976, Evans and Ritter committed armed robberies in three different cities. (Tr. 323) They then went to Mobile, Alabama to commit another robbery. (Tr. 212, 324)

On January 5, 1977, in Mobile, Evans and Ritter robbed a pawn shop where Edward A. Nassar was employed. (Tr. 211-

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[3]References to "Tr." are references to the two-volume record of Evans' state court trial. That state trial record was an exhibit to the answer in the district court, and is part of the record on appeal.

219, 324-325) During the robbery, Evans murdered Nassar by shooting him in the back while Nassar's seven- and nine-year old daughters watched. (Tr. 142, 215-219, 324-325)

In the two months after Evans murdered Nassar, Evans and Ritter committed numerous violent crimes, including more robberies, in a half dozen different states. (Tr. 326-329) They were finally apprehended in Arkansas by F.B.I. agents on March 7, 1977. (Tr. 156-166) The Nassar murder weapon was found in Evans' motel room. (Tr. 142-145, 157-162, 198-200)

On March 8, 1979, after being informed of his rights and waiving them, Evans voluntarily confessed to F.B.I. agents in Arkansas that he was guilty of the robbery and murder of Nassar, as well as of numerous other crimes. (Tr. 170-174, 275-278) After waiving extradition,

Evans was taken to Mobile where, on March 11, 1977, he voluntarily gave to the Mobile Police Department another statement confessing that he had robbed and murdered Nassar, and had committed numerous other crimes. (Tr. 288-292, 331)

The State Trial Court Proceedings

On April 4, 1977, Evans voluntarily appeared before the Mobile County Grand Jury, against the advice of his attorney, and freely testified at length about robbing and murdering Nassar. (Tr. 3, 230-233, 318-337) Evans told the grand jury that he fully understood the consequences of his action in shooting Nassar, that Nassar was not the first man he had killed, and that he would not hesitate to kill again. (Tr. 325, 333-336) Evans also told the grand jury that he wanted to be indicted as soon as possible, that he intended to plead guilty, and that he

preferred execution to life in prison. (Tr. 332, 337)

On April 8, 1977, the Mobile County Grand Jury indicted Evans for the crime of robbery during the course of which the victim is murdered (Tr. 1), which is a capital offense under Code of Alabama 1975, § 13-11-2(a)(2).

At arraignment on April 18, 1977, against the advice of his attorneys, Evans pleaded guilty. (Tr. 67-68, 71) The trial court entered the guilty plea in the official minutes of the court (Tr. 8), and notwithstanding that plea the case was submitted to a jury for the reasons discussed on pp. 53-56 of this petition, infra.

Evans and Ritter were jointly tried before a Mobile County jury on April 26, 1977. (Tr. 8, 72-228) The State's evidence included two eyewitnesses who positively identified Evans, expert

testimony matching the death bullet to Evans' pistol, and Evans' confession to the F.B.I. (Tr. 100-101, 131-133, 142-162, 182-183, 198-200, 277-278)[4]

After the State rested, Evans filed a written "Motion to Enter Guilty Plea," which he had signed acknowledging and waiving his constitutional right not to plead guilty. (Tr. 207-209, 252, 285-286) Evans' written guilty plea was accepted by the court and admitted into evidence. (Tr. 207-209, 252, 285-286)

Thereafter, Evans took the stand and testified against himself. (Tr. 210-216) As his own direct examination, Evans told the jury:

> MR. EVANS: My name is John Louis Evans, and on January the 5th, I was involved in the crime of Eddie Nassar. I am also the one that did pull the trigger and shoot and kill him during

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[4]The State's evidence is detailed in Evans v. State, 361 So. 2d 654, 656-661 (Ala. Cr. App. 1977), aff'd, 361 So. 2d 666 (Ala. 1978), cert. denied, 440 U.S. 930 (1979).

> the commission of a felony, a robbery. Our whole trip was based on robbery. Kind of a spree. It was well planned, and I've been in crime a long time. Before you go back in there, the only thing I've got to say to the Jury is that I've been at it a long time, and if you don't come back with a death sentence, which is the only other thing I think you can come out with, I'm going to get out, and I'm going to do it again. There's not any question whatsoever. I have no intention whatsoever of ever reforming in any way, so I think you should do what you have to do, and I would rather die by electrocution than to spend the rest of my life in the penitentiary. So, I'm asking very sincerely that you come back with a positive verdict for the State. That's all I have to say. (Tr. 211)

On cross-examination, Evans testified he had shot Nassar in the back. (Tr. 215) When asked if he felt any remorse for murdering Nassar, Evans stated, "Not at all." (Tr. 216) Evans also said that his attorneys had advised him 20 to 30 times not to pursue the course of action he was pursuing at trial. (Tr. 215-216)

After Evans testified, his co-defendant Ritter took the stand and testified. (Tr. 216-221) In his testimony, Ritter confessed his part in the crime and implicated Evans. (Tr. 218-221)

The jury took less than fifteen minutes to convict Evans of the capital offense. (Tr. 226-227) Following a sentence hearing on April 27, 1977, the trial court sentenced Evans to death. (Tr. 9-12, 229-337)[5]

The State Appellate Court Proceedings

Evans' conviction and sentence were automatically appealed pursuant to Code of

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[5]Ritter was also convicted of the capital offense and sentenced to death. Ritter's conviction and sentence were affirmed in Evans and Ritter v. State, 361 So. 2d 654 (Ala. Cr. App. 1977), remanded, 375 So. 2d 266 (Ala. Cr. App. 1978), aff'd, 375 So. 2d 270 (Ala. 1979), vacated and remanded, 100 S. Ct. 3044 (1980). The Ritter case is presently before the Alabama Supreme Court on remand from this Court. See pp. 58 - 59 of this petition, infra.

Alabama 1975, § 13-11-5, and were affirmed by the Alabama Court of Criminal Appeals in Evans v. State, 361 So. 2d 654 (Ala. Cr. App. 1977). The Alabama Supreme Court affirmed in Evans v. State, 361 So. 2d 666 (Ala. 1978), and this Court denied certiorari in Evans v. Alabama, 440 U.S. 930 (1979).

The Federal District Court Proceeding

On April 12, 1979, Evans filed a petition for a writ of habeas corpus in the United States District Court for the Southern District of Alabama (R. 1-6),[6] which had jurisdiction pursuant to 28 U.S.C. §2254. The district court entered judgment on June 12, 1979, denying Evans' petition (R. 114), and issued an accompanying opinion which is reported as

[6]References to "R." are references to the record on appeal in this case.

Evans v. Britton, 472 F. Supp. 707 (S.D. Ala. 1979), and is reproduced as Appendix I, pp. 46a - 128a, hereto.

The Federal Appellate Court Proceeding

Evans appealed to the United States Court of Appeals for the Fifth Circuit, which had jurisdiction pursuant to 28 U.S.C. §2253.

After submission of the appeal, this Court issued its opinion in Beck v. Alabama, 100 S. Ct. 2382 (June 20, 1980), holding that it was unconstitutional to execute a capital defendant whose jury had not been permitted to consider a lesser included non-capital offense verdict when the evidence at trial would have supported such a verdict. Thereafter, Petitioners filed in the Fifth Circuit a supplemental brief arguing that Evans' case was distinguishable from Beck both because there was no basis for a lesser included offense

verdict at Evans' trial, and because Evans had pleaded guilty. Evans, on the other hand, argued that guilty pleas had no effect in capital cases as a matter of Alabama law.

On July 1, 1980, Petitioner filed a motion requesting that the Fifth Circuit certify to the Alabama Supreme Court specified questions of Alabama law, the answers to which would either avoid in whole or part the federal constitutional issues or at least substantially modify those issues. (That motion is reproduced as Appendix D, pp. 23a - 29a, hereto.)

On October 15, 1980, the Fifth Circuit reversed the district court in an opinion reported as Evans v. Britton, 628 F. 2d 400 (5th Cir. 1980). (That opinion is reproduced as Appendix C, pp. 15a - 22a, hereto.) The per curiam opinion, joined by two judges, refused to certify the state law questions to the Alabama

Supreme Court, and held that Evans' conviction and sentence must be set aside. One judge dissented because of the failure to certify the state law issues.

Petitioners filed a Petition for Rehearing with a Suggestion for Rehearing En Banc. Thereafter, by letter dated January 27, 1981, Petitioners informed the Fifth Circuit that the Alabama Supreme Court had agreed to decide the case of Evans' codefendant, Wayne Eugene Ritter, on remand to it from this Court. The letter further explained that in the Ritter case the Alabama Supreme Court would decide state law issues which would either moot or at least reshape the federal issues in this case, and the letter requested that a decision on the rehearing petition be held in abeyance until the Alabama Supreme Court released its Ritter decision. (The letter is reproduced as Appendix F, pp. 34a - 38a, hereto.)

On March 9, 1981, the Fifth Circuit panel extended its original opinion but denied the petition for rehearing in all other respects. (The opinion on rehearing is reproduced as Appendix B, pp. 3a - 14a, hereto.)

On March 12, 1981, Petitioners filed a Motion for Clarification of En Banc Status (which is reproduced as Appendix G, pp. 39a - 44a, hereto), and on March 20, 1981, the Fifth Circuit denied the motion to clarify (in an order reproduced as Appendix H, p. 45a, hereto).[7]

On March 20, 1981, the Fifth Circuit stayed its mandate pending the filing of this petition.

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[7] The Fifth Circuit's refusal to clarify the en banc status of this case is certainly curious in view of its usual practice of entering an order either granting or denying a request for en banc rehearing.

Apparently, Petitioner's en banc suggestion to the Fifth Circuit has either been "lost" by that court, or it has been denied sub silento.

REASONS FOR GRANTING THE WRIT

I.

The Decision Below Misinterprets this Court's Decision in Beck v. Alabama, 100 S. Ct. 2382 (1980), and is in Conflict with Related Decisions of this Court

The Court Below Misinterpreted and Misapplied the Beck Decision

In Beck v. Alabama, 100 S. Ct. 2382 (1980), this Court held that it was unconstitutional to impose a sentence of death on a defendant when the jury which returned the capital verdict had not been permitted to consider returning a lesser included non-capital offense verdict and "when the evidence at trial would have supported such a lesser verdict." Id., at 2384. It was undisputed in the Beck case that there was evidence to support a lesser offense instruction and that the jury would have received such an instruction had it not been for the unconstitutional preclusion clause in Alabama's capital

punishment statute. Id., at 2385 & n. 5. This Court carefully limited its decision to "these circumstances." Id., at 2384.

In the present case the Fifth Circuit has disregarded those careful limitations and has held that the Beck decision requires that all pre-Beck Alabama capital convictions and sentences be reversed regardless of the circumstances in a particular case. The court below has misinterpreted Beck as mandating what amounts to a conclusive presumption of harm for all pre-Beck capital cases.

The absolute nature of this new presumption of harm rule is illustrated by its application to this case in which there was not one jot, speck, or iota of evidence at Respondent Evans' trial to support any lesser included offense instruction. Evans not only admitted and confessed his guilt at every stage, including the trial, he even pleaded guilty

to the capital offense and asked to be sentenced to death. See, pp. 4 - 9, supra.

After Evans received the capital conviction and death sentence which he had so actively sought and which he so richly deserved, the court below held that that conviction and sentence must be set aside because of the unconstitutionality of the preclusion clause, a statutory provision which did not even operate in Evans' case. See, pp. 29 - 37, infra. Moreover, the court below held, Evans v. Britton, 628 F. 2d 400, 401 (5th Cir. 1980), see, p. 11a, infra, that any contrary decision "has been foreclosed by the Supreme Court."

The court below's misinterpretation of the Beck decision is based on three words — "in every case" — which appear in the Beck opinion on 100 S. Ct. at 2392. By reading those three words and the paragraph they are in out of context, the

lower court has erroneously concluded that this Court held in Beck that every defendant who had been tried under the Alabama capital punishment statute had been subjected to unconstitutionally unreliable factfinding, regardless of the particular circumstances in his case. See, Evans v. Britton, 628 F. 2d at 401 (before rehearing), and slip op. at 4396 (on rehearing); pp. 11a - 12a, 17a - 19a, and 21a, infra.

This Court neither made nor intended to make such a far-reaching holding in Beck, because in the very first paragraph of its Beck opinion, this Court limited its holding as follows:

> We granted certiorari to decide the following question:
>
> "May a sentence of death constitutionally be imposed after a jury verdict of guilt of a capital offense, when the jury was not permitted to consider a verdict of guilt of a lesser included non-capital offense, and when the evidence

> would have supported such a verdict?" ___ U.S. ___, 100 S. Ct. 204, 62 L. Ed. 2d 132.
>
> We now hold that the death penalty may not be imposed under these circumstances.

100 S. Ct. at 2384 (emphasis added). The Beck case did not present any other question, because the State conceded that the evidence in that case was such that had it not been for the preclusion clause Beck's jury would have been instructed on lesser included offenses. 100 S. Ct. at 2385 & n. 5. The present case is radically different, but the court below has held that this difference is of no legal significance, because it has misinterpreted the three words "in every case."

The words "in every case," as they appear on 100 S. Ct. at 2392, mean in every case within the scope of the grant of certiorari. They man "in every case" covered by what this Court described as

"these circumstances," 100 S. Ct. at 2384 — every case in which there was an evidentiary basis for a lesser included offense instruction which was not given. They mean in Beck's case and in all the many cases like it, but not in the unusual case like this one in which the defendant not only does not contest his guilt, but also admits, confesses, and brags about it, and even enters a guilty plea.

The full paragraph of the Beck opinion from which the lower court lifted the words "in every case" is as follows:

> In the final analysis the difficulty with the Alabama statute is that it interjects irrelevant considerations into the factfinding process, diverting the jury's attention from the central issue of whether the State has satisfied its burden of proving beyond a reasonable doubt that the defendant is guilty of a capital crime. Thus, on the one hand, the unavailability of the third option of convicting on a lesser included offense may encourage the jury to convict for an impermissible reason—its belief

> that the defendant is guilty of some serious crime and should be punished. On the other hand, the apparently mandatory nature of the death penalty may encourage it to acquit for an equally impermissible reason—that, whatever his crime, the defendant does not deserve death. In any particular case these two extraneous factors may favor the defendant or the prosecution or they may cancel each other out. But in every case they introduce a level of uncertainty and unreliability into the factfinding process that cannot be tolerated in a capital case.

100 S. Ct. at 2392 (emphasis added; footnote omitted). The two underlined statements, referring to the "extraneous factors" cannot possibly have been intended to apply to literally "every case" tried under Alabama's statute, including the present one.

Take, for example, the first statement or "extraneous factor" referred to: "the unavailability of the third option of convicting on a lesser included offense may encourage the jury to convict for an

impermissible reason — its belief that the defendant is guilty of some crime and should be punished." This Court cannot possibly have meant to say that in literally "every case" in which juries are not permitted to consider lesser included offense verdicts there is an intolerable level of uncertainty and a risk of unreliable factfinding.

This Court cannot have meant to say that, because the rule in every jurisdiction in this country — including the federal courts — is that lesser included offense instructions need not be given when there is absolutely no evidence to support them. See, Beck v. Alabama, 100 S. Ct. at 2387-2390 (collecting cases). No one has ever suggested that the Constitution requires that a capital jury be instructed on a lesser included non-capital offense which is not supported by the evidence, and this Court itself has held, at least implicitly,

that the Constitution does not. See, Gregg v. Georgia, 428 U.S. 153, 160-163, 215-216 (1976) (upholding Georgia's statute which provides for lesser included offense instructions only when such instructions are supported by some "view of the evidence").

This Court's statement in the Beck opinion about jury verdicts being unreliable in the absence of lesser included offense options must have been intended to mean "in every case" in which there was an evidentiary predicate for lesser offense verdict options, and only in such cases. Otherwise, that literal language would reverse Gregg v. Georgia, supra, in which the trial court refused to instruct the jury on a particular lesser included offense because there was no evidence to support it. 428 U.S. at 161 n. 2. Taking the "every case" language out of context and reading it literally, as the

lower court did, will also lead to the invalidation of every single capital punishment statute in this country, because all of the statutes provide for lesser included offense instructions when, and only when, such instructions are supported by the evidence.

A similar type of limitation must also be applied to the phrase "in every case" insofar as it refers to the second "extraneous factor" set out in the paragraph of the Beck opinion in question. That second statement referring to another "extraneous factor" that may affect the jury is that "the apparently mandatory nature of the death penalty may encourage it to acquit for an equally impermissible reason — that, whatever his crime, the defendant does not deserve death." 100 S. Ct. at 2392 (footnote omitted). Surely, this Court cannot have meant that there was a constitutionally intolerable risk

of acquittal in Alabama capital cases tried before the Beck decision, because this Court pointed out in that same opinion that there had been a 96% conviction rate in pre-Beck capital cases. 100 S. Ct. at 2391 & n. 18. This Court cannot have meant to find that there had been an intolerable risk of improper acquittals in pre-Beck cases like the present one unless it meant to hold that a 4% acquittal rate was intolerably high.

The meaning of the words "in every case" and the passage in the Beck opinion from which the lower court lifted those words is also evident from the particular argument of the State that that passage was written to answer. The State had argued that any effect the preclusion clause might have in influencing a jury to wrongfully convict a defendant of a capital offense when the evidence showed that the defendant was guilty of a

serious lesser offense would be offset by the effect of the seemingly mandatory verdict form requirement. The State had argued that when there was an evidentiary basis for a lesser offense the preclusion clause's push toward improper convictions would be offset by the verdict form's push toward improper acquittals. Beck v. Alabama, 100 S. Ct. at 2390 - 2391.

This Court rejected that argument of the State, id., at 2391 - 2392, but that is not the important point here. The important point here is that the passage referring to an intolerable risk of erroneous factfinding "in every case" came directly in answer to the particular argument of the State which has been referred to. The State argued that in every case like Beck's in which there was an evidentiary basis for lesser included offense there would be an offsetting of pressures on the jury. This Court in rejecting that argument answered that in

every such case — "in every case" like Beck's — there would be uncertain and unreliable factfinding.

But in cases like the present one where there was no evidentiary basis for a lesser included offense, there was no pressure on the jury to erroneously convict the defendant of the capital offense in order to prevent his release, because there was no occasion for the jury to think that the defendant was guilty of a serious lesser offense and should not be acquitted for that reason.

Nor do defendants like Evans have any basis for complaint about the jury verdict form requirement. Its only possible effect would be to encourage the jury to acquit a defendant who should be convicted. Beck v. Alabama, 100 S. Ct. at 2390, 2392. Since there was only a 4% acquittal rate, id., at 2391, there is no evidence that the jury verdict form

requirement resulted in any improper acquittals. In any event, Evans has no basis to complain about being convicted under a procedure which might have encouraged his jury to erroneously acquit him. If the procedure erred in the present case, it erred in Evans' favor, and Evans was convicted in spite of it, not because of it.

In summary, the court below misinterpreted and misapplied this Court's decision in Beck v. Alabama, 100 S. Ct. 2382 (1980). In doing so, the court below ignored this Court's own careful limitation in the grant of certiorari and holding in the Beck case, and it did so by reading three words from the opinion out of context. The net result, a rule which conclusively presumes harm in all cases regardless of the factual circumstances in each individual case, is not only unauthorized by any decision

of this Court but is totally at odds with this Court's decisions.

Respondent Evans was Not Harmed or Prejudiced in any way by the Mere Existence of the Preclusion Clause

The court below felt compelled to conclusively presume harm and prejudice, because there was absolutely no evidence on which to base such a conclusion. The record on appeal includes the entire state trial court transcript and the transcript of the habeas hearing held before the district court. Neither contains even a speck of evidence that Evans' trial would have been any different had the preclusion clause not existed. All of the evidence establishes beyond dispute that the preclusion clause had no effect on Evans or the trial.

As this Court has noted, absent the preclusion clause the rule in Alabama is that a defendant is entitled to a lesser

included offense instruction if there is any reasonable theory from the evidence which would support a verdict for the lesser instead of the higher offense. Beck v. Alabama, 100 S. Ct. at 2385 n. 5. Under Alabama law, a defendant is entitled to a lesser included offense instruction only if there is some evidentiary basis for it — some basis in the evidence from which the jury could reasonably conclude that the defendant was innocent of the higher offense but guilty of some specific lesser offense. As the Alabama Supreme Court said in severing the preclusion clause from the remainder of the capital punishment statute, "[a]bsent the fourteen words which constitute the preclusion clause, the long established Alabama statutory and common law rule will apply so that juries in capital cases will be instructed on any lesser included offenses supported by the evidence."

Beck v. State, ___ So. 2d ___, No. 77-530 (Ala. Dec. 19, 1980) (on remand from the United States Supreme Court), slip op. at 24.

The preclusion clause came into operation only in cases, like Beck, where there was an evidentiary basis for lesser included offense instructions which would have been given had it not been for the preclusion clause. In cases like the present one, however, the preclusion clause had no effect because there would have been no lesser included offense instruction given anyway. There was no evidentiary basis for lesser included offense instructions in this case, because Evans admitted, confessed, and pleaded guilty to the capital offense at every stage of the case up to and including

the trial itself. See pp. 4 - 9, supra.[8]

Without disputing the fact that there was no evidence to support any lesser included offense verdict, the court below said:

> It seems to us, however, that it offends the most fundamental notions of fairness for the state first to tell Evans that there is no lesser offense and then later urge that this death sentence should be upheld because he failed to present evidence which would prove a lesser included offense.

Evans v. Britton, 628 F. 2d 400, 401 (5th Cir. 1980); p. 20a, infra. That statement totally misapprehends the nature of the preclusion clause and the way it operated.

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[8]If there is any doubt about whether as a matter of state law the jury in this case would have been instructed on any lesser included offense absent the preclusion clause, then the court below should have certified that question to the Alabama Supreme Court. The Petitioners moved the court below to do so. See paragraph 1(c) of the Motion to Certify Questions of Alabama Law to the Alabama Supreme Court, which is reproduced on pp. 24a - 25a of the appendix. See also, pp. 48 - 58, infra.

The State never "told" Evans that there were no lesser included offenses which he could attempt to establish in order to avoid a capital conviction. The preclusion clause did not result in the jury being told to disregard the possibility that a defendant was guilty of a lesser non-capital offense but not of the capital offense itself. Instead, the preclusion clause "told" the jury to acquit if it was convinced that the defendant was guilty of anything less than the capital offense. The preclusion clause "told" Evans that if he could convince the jury he was guilty of anything less than the capital offense — and that included a lesser non-capital offense — then he was due to be released.

The preclusion clause did not preclude a defendant from presenting evidence that he was guilty of only a lesser non-capital offense, it only precluded the

defendant from being convicted and sentenced for such an offense. The defendant was still free to present lesser included offense evidence and argue that he was due to be acquitted of the capital offense because he was guilty of only a lesser offense. That is exactly what the defendant Beck did in Beck v. Alabama, 100 S. Ct. at 2385, which proves that the preclusion clause did not bar lesser offense evidence.

Nor did the preclusion clause discourage defendants from presenting lesser offense evidence. Indeed, if anything, the preclusion clause actually encouraged the presentation of lesser offense evidence that otherwise might not have been brought forward. That is true, because without the preclusion clause a defendant who proved himself guilty of a serious lesser non-capital offense would have guaranteed himself a very long term in prison.

However, so long as the preclusion clause operated, a capital defendant had everything to gain and absolutely nothing to lose by attempting to prove that he was guilty of a lesser offense instead of the capital offense. The defendant in Beck v. Alabama, supra, knew when he took the stand that if he persuaded the jury he was guilty of the lesser offenses of robbery and felony murder instead of the capital offense he would get off scott free. That is why he admitted his guilt of those lesser offenses.

Because of the preclusion clause, Beck, Evans, and all the other capital defendants had no reason not to present evidence of lesser offenses. On the other hand, if the preclusion clause had not existed, they would have had reason not to present evidence of lesser offenses — the long prison term such evidence would have guaranteed as a minimum for them.

The point is not that the preclusion clause did not operate unconstitutionally when evidence of lesser offenses was in fact presented -- that has already been decided in the Beck case. Instead, the point is that the preclusion clause did not prevent lesser included offense evidence, did not discourage the presentation of such evidence, and if anything actually operated as an incentive for the presentation of such evidence.

The present case is the prime example of how the preclusion clause actually operated as an incentive for the defendant to present lesser offense evidence to the jury. Evans told the grand jury that he intended to plead guilty and seek electrocution. (Tr. 332, 337) He explained to the grand jury that, "...I'm asking to be electrocuted in a, uh, a chair because I can't see spending the rest of my life locked up in a penitentiary,

you know, I'm too young for that." (Tr. 332) Absent the preclusion clause the thing Evans feared the most — spending the rest of his life "locked up in a penitentiary" — was the guaranteed result of convincing the jury that he was guilty of a serious lesser non-capital offense.

However, with the preclusion clause, Evans would have been due to be discharged on the entire charge if he could have convinced the jury that he was guilty of only some lesser non-capital offense. At least, he had nothing to lose by pursuing that strategy. The fact that Evans did not respond to the incentive provided by the preclusion clause by presenting a lesser defense simply shows that he was so hell-bent on self-destruction that he was not affected by the preclusion clause or by anything else.

The court below speculated that the preclusion clause was a "brooding omnipresence" which must have affected every aspect of Evans' trial. Evans v. Britton, 628 F. 2d at 401; pp. 19a - 20a, infra. As explained above, if the preclusion clause had any effect, it could only have been to encourage Evans to develop, present, and argue lesser offense evidence.

The fact that the court below's speculation is unfounded is demonstrated by the record. The record shows that neither the preclusion clause nor any other aspect of Alabama's capital punishment statute caused Evans to pursue the course of action he took at trial. Evans began his legally self-destructive course in Little Rock, Arkansas, on March 8, 1977, the day after he was arrested there. Before Evans knew anything about the particularities of Alabama's statute and long before he had even heard of the

preclusion clause, he freely and voluntarily confessed to F.B.I. agents in Little Rock his guilt of more than a dozen violent crimes including this capital offense. (Tr. 170-174, 275-278)

Evans then waived extradition, and after being transported to Alabama, he freely and voluntarily confessed again on March 11, 1977, to the Mobile Police Department. (Tr. 288-292, 331) Evans insisted on appearing before the grand jury, and he freely and voluntarily confessed still another time to that body. (Tr. 3, 318-337) He told the grand jury that he intended to plead guilty and seek electrocution. (Tr. 332, 337)

The record establishes that the State of Alabama is not being fundamentally unfair to Mr. Evans. The Mr. Evans who made that claim before the court below is the same Mr. Evans who first derived great

pleasure from committing several dozen violent crimes, including the murder of the innocent victim in this case, and then took such delight in bragging about his crimes over and over again.

What is fundamentally unfair is the rule adopted by the court below which conclusively presumes harm and prejudice from nothing more than sheer speculation. Not only is that rule fundamentally unfair, it also is contrary to the decisions of this Court.

The Rule of Presumed Harm Adopted by the Court Below is Contrary to Decisions of this Court

This Court has long held that criminal convictions are not to be set aside, either on habeas or direct appeal, based on mere speculation about harm and prejudice. The long-established rule of this Court was expressed in Beck v.

Washington, 369 U.S. 541, 558 (1962), as follows:

> "While this Court stands ready to correct violations of constitutional rights, it also holds that 'it is not asking too much that the burden of showing essential unfairness be sustained by him who claims such injustice and seeks to have the result set aside, and that it be sustained not as a matter of speculation but as a demonstrable reality.'" United States ex rel. Darcy v. Handy, 351 U.S. 454, 462, 76 S. Ct. 965, 100 L. Ed. 1331 (1956). This burden has not been met.

The rule adopted by the court below did not place the burden of showing essential unfairness on Evans but instead conclusively presumes unfairness based on nothing more than that court's own speculation about what might have happened had the preclusion clause never existed.

The court below violated the rule announced in Beck v. Washington, supra, by not requiring Evans to establish harm and prejudice "as a demonstrable reality."

Indeed, under the rule announced below, a habeas petitioner need not even allege harm and prejudice. While Evans' habeas petition did aver that the preclusion clause was unconstitutional, the petition did not allege that Evans would have acted any differently had it not been for the preclusion clause. (R. 1-8, 24-35) Evans has never alleged that the preclusion clause affected his actions or his trial in anyway, and under the decision below he is not required to do so.

Instead of reversing the district court, the appellate court below at most should have remanded the case for a hearing to determine whether Evans was harmed or prejudiced in any way by the mere existence of the preclusion clause. That is exactly what the court below has done in other habeas cases. See, e.g., Lockett v. Blackburn, 571 F. 2d 309 (5th Cir.), cert. denied, 439 U.S. 873 (1978)

(remanding for a harm and prejudice hearing because, "[a] habeas petitioner must both allege and demonstrate prejudice to obtain the writ.")

The decision below is also contrary to the rule expressed in Blackledge v. Allison, 431 U.S. 63, 74 (1977), that:

> Solemn declarations in open court carry a strong presumption of verity. The subsequent presentation of conclusory allegations unsupported by specifics is subject to summary dismissal, as are contentions that in the face of the record are wholly incredible. Machibroda, supra, at 495-496, 82 S. Ct. 510, 7 L. Ed. 2d 473 (§ 2255); Price v. Johnston, supra, at 286-287, 68 S. Ct. 1049, 92 L. Ed. 1356 (§ 2243). (footnote omitted)

Evans solemnly declared in open court at arraignment (Tr. 8, 67-68, 71), and at trial (Tr. 207-216, 252, 285-286) that he was guilty of the capital offense and should be convicted. The court below has disregarded those solemn declarations and it has done so based on nothing more than

that court's own contentions — never even pleaded by Evans — which in the face of the record are wholly incredible.

If a conclusive presumption of prejudice rule is to be adopted in place of the rule announced by this Court in Beck v. Washington, supra, and if solemn declarations in open court are to be disregarded contrary to this Court's expressions in Blackledge v. Allison, supra, such a major change in the law should not be made by a lower appellate court. This Court should grant the writ to examine, consider, and either accept or reject the conclusive presumption of prejudice rule adopted by the court below.

II.

The Decision Below is Contrary to Decisions of this Court Concerning the Effect of Guilty Pleas

The court below held that Evans' guilty plea to the capital offense had no effect on the preclusion clause issue

for two reasons. First, the court below held that as a matter of Alabama law a guilty plea has no effect in a capital case. Evans v. Britton, ___ F. 2d ___ (5th Cir. 1981) (on rehearing), slip op. at 4393-4395; pp. 4a - 8a, 13a - 14a, infra. As explained on pp. 53 - 56, infra, that holding misinterprets Alabama law and underscores the court below's error in failing to certify that question of Alabama law to the Alabama Supreme Court.

Secondly, the court below held that, as a matter of federal constitutional law, a guilty plea has no effect at all other than to waive constitutional challenges to proceedings which occurred before the plea was entered. Evans v. Britton, supra, slip op. at 4395-4396; pp. 8a - 11a, infra. While cases like Tollett v. Henderson, 411 U.S. 258, 267 (1973), relied on by the court below, do establish that one effect of a guilty plea is to waive constitutional

defects occurring prior to the plea, this Court has never limited the effect of guilty pleas to merely that.

McCarthy v. United States, 394 U.S. 459, 466 (1969), said that, "A guilty plea is an admission of all the elements of a formal criminal charge." This Court in Menna v. New York, 423 U.S. 61 (1975), reviewed its decisions in Tollett v. Henderson, 411 U.S. 258 (1973), Brady v. United States, 397 U.S. 742 (1970), and McMann v. Richardson, 397 U.S. 759 (1970). In doing so, this Court explained that:

> In Tollett we emphasize that waiver was not the basic ingredient of this line of cases, 411 U.S. at 266. The point of these cases is that a counseled plea of guilty is an admission of factual guilt so reliable that, where voluntary and intelligent, it quite validly removes the issue of factual guilt from the case. In most cases, factual guilt is a sufficient basis for the State's imposition of punishment. A guilty plea, therefore, simply renders irrelevant those constitutional

> violations not logically inconsistent with the valid establishment of factual guilt and which do not stand in the way of conviction, if factual guilt is validly established. ...

Menna v. New York, 423 U.S. at 62-63, n. 2 (emphasis in original).

In this Court's words, Evans' guilty plea "quite validly" removes the issue of factual guilt from this case. Since the sole danger of the preclusion clause was that it increased the risk of an erroneous factual determination of guilt, Beck v. Alabama, 100 S. Ct. at 2387-2390, the mere existence of the clause is rendered irrelevant by Evans' guilty plea which removed the issue of factual guilt from the case.

The holding of the court below that guilty pleas have only a limited waiver effect and do not remove the issue of factual guilt from a case is contrary to this Court's prior decisions which were explained in Menna v. New York, supra. This Court should grant certiorari to

clarify the matter and to correct the court below.

III.

The Court Below Adopted a New Rule for Certification of State Law Questions that is Contrary to this Court's Decisions and Policies

The Rule Established by Decisions of this Court

In Bellotti v. Baird, 428 U.S. 132, 147 (1976), this Court established the rule that a federal court should certify state law questions to the appropriate state supreme court whenever answers to such questions "might avoid in whole or in part the necessity for federal constitutional adjudication, or at least materially change the nature of the problem." See, e.g., Boehning v. Indiana Employees Asso., 423 U.S. 6, 7-8 (1975) (abstention required where state law answers might moot federal issue); Dillard v. Virginia Industrial Commission, 416 U.S. 783, 797-798

(1974) (the court should abstain where state law question could be dispositive); Lake Carriers' Asso. v. MacMullen, 406 U.S. 498, 510-511 (1972) (a "paradigm case" for abstention is where an answer to a state law issue might "avoid or modify" the federal issue); Fornaris v. Ridge Tool Co., 400 U.S. 41, 44 (1970) (abstention ordered where "it is conceivable" that answers to state law issues might narrow the federal question.)

The Rule Adopted by the Court Below

After this Court's decision in Beck v. Alabama, 100 S. Ct. 2382 (1980), and before the court below issued any decision in this case, Petitioners filed a motion requesting the court below to certify to the Alabama Supreme Court seven specified questions of Alabama law which were raised in the wake of the Beck decision. The Motion to Certify is reproduced as Appendix D, pp. 23a - 29a, infra.

The motion stated that there were no clear, controlling precedents in the decisions of the Alabama Supreme Court on the specified state law questions, that resolution of the questions would avoid in whole or in part the federal constitutional issues in this case, or at least substantially modify them; and, that answers to the state law question should come from the Alabama Supreme Court because those answers would vitally affect the public policy of Alabama. The motion also stated that Alabama law expressly provides for certification of state law questions to the Alabama Supreme Court from federal courts. See pp. 26a - 28a.[9]

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[9]The Alabama Constitution of 1901, Article VI, 140(b)(3), as amended by Amendment No. 328, authorizes the Alabama Supreme Court to answer state law questions certified to it by federal courts. Alabama Rule of Appellate Procedure 18, reproduced as Appendix E, pp. 30a - 33a, infra, provides the procedure for answering such questions.

No one has ever doubted the adequacy of Alabama's certification procedure. Indeed, the
[footnote continued on next page]

Without taking issue with any of the grounds of the Motion to Certify, the court below, with one judge dissenting, refused to certify any of the state law questions to the Alabama Supreme Court.[10]

[footnote continued from preceding page]

court below has been so impressed with Alabama's certification procedure that it has twice felt compelled to praise the procedure. See, Tyler v. Insurance Co. of North America, 520 F. 2d 341 (5th Cir. 1975) ("the valuable tool provided by the certification provision of the Alabama Constitution"); Barnes v. Atlantic & Pacific Life Ins. Co., 530 F. 2d 98, 99 (5th Cir. 1976) ("certification procedures such as Alabama now has are invaluable tools of cooperative judicial federalism.").

[10]For unknown reasons, the court below discussed the certification issue only in terms of the severability question. Evans v. Britton, 628 F. 2d at 401-403; pp. 17a - 22a, infra. There is no longer any need to certify the severability issue, since the Alabama Supreme Court has answered it in Beck v. State, No. 77-530 (Ala. Dec. 19, 1980) (on remand), slip op. at 24-27, by holding that the preclusion clause is severable from the remainder of the statute.

However, some of the remaining state law questions specified in the Motion to Certify have not been answered and could still avoid in whole or in part, or at least redefine, the federal issues. See pp. 52 n. 11, and 53-56, infra.

The majority reasoned that since it had concluded that Evans was entitled to a new trial as a federal constitutional matter, "certification would be nothing more than an empty academic exercise." Evans v. Britton, 628 F. 2d at 401; p. 21a, infra.

Under the rule adopted by the court below, state law questions are not to be certified if answers to the federal constitutional issues will make the state questions moot. This rule stands the law of abstention-certification on its head. The purpose of abstention-certification is not to avoid or define state law questions by answering federal constitutional issues, but just the opposite. The court below has the rule backwards — the idea is to make federal issues "an empty academic exercise," not the state law questions.[11]

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[11] The fifth state law question Petitioners moved the court below to certify — whether after Beck v. Alabama, supra, Evans was entitled as a matter of state law to have his conviction and sentence reversed — illustrates how all the federal constitutional issues might have been mooted by answers to the state law questions. See p. 25a, infra.

The State Law Question Concerning the Guilty Plea

What the rule adopted below can lead to is illustrated by the way the court below handled the state law question concerning the status and effect of Evans' guilty plea under Alabama law.

Evans pleaded guilty at arraignment (Tr. 67-68, 71) and at trial. (Tr. 207-209, 252, 285-286) In Alabama, when a defendant in a capital case pleads guilty, the case against him is still submitted to a jury, since only a jury can sentence a defendant to death under Alabama law. Prothro v. State, 370 So. 2d 740 (Ala. Cr. App. 1979).

The fact that guilty plea capital cases are submitted to juries does not mean that a guilty plea has no effect under Alabama law. The Alabama Court of Criminal Appeals has held that notwithstanding the necessity of presenting every capital case to a jury, a guilty plea in

a capital case still has the effect of waiving all non-jurisdictional defects in the case. Graham v. State, ___ So. 2d ___, No. 4 Div. 787 (Ala. Cr. App. 1980), slip op. at 16, cert. granted, No. 79-568 (Ala. Jan. 6, 1981).

The Alabama Supreme Court held in the appeal of Evans' co-defendant, in which the facts were identical to the ones in the present case, that a guilty plea in a capital case eliminates any possibility of reversible error stemming from an omission in the trial court's oral charge. Ritter v. State, 375 So. 2d 270, 276 (Ala. 1979), vacated and remanded, 100 S. Ct. 3044 (1980). The court below misread the Alabama Supreme Court's Ritter opinion, which does say that the trial court "did not accept the guilty plea but instead set the matter for presentation to a jury." Evans v. Britton, supra, slip op. at 4394; p. 5a, infra. The court below ignored the

Alabama Supreme Court's explanation that the trial court ordered the matter presented to a jury solely because "only a jury may sentence a defendant to death under our capital felony statute." Ritter v. State, 375 So. 2d at 273. The court below also ignored the Alabama Supreme Court's holding that notwithstanding the fact that the trial court did not "accept" the guilty plea in lieu of a trial, the guilty plea nonetheless, as a matter of state law, waived any defect in the jury instructions. Id. at 275-276.

The crucial point, which the court below missed, is that even though guilty pleas are not "accepted" as the final step in an Alabama capital case, as a matter of Alabama law guilty pleas do preclude review of certain alleged defects, including any omission from the trial court's oral charge. This point of Alabama law is controlling in this case because Evans is

complaining about the omission from the trial court's charge to the jury of any lesser included offense instruction.

The harm which the court below has done by running rough-shod over a controlling issue of state law is not confined to this particular case. Thirteen of the first sixty-five capital convictions under Alabama's statute were based on plea-bargained guilty pleas. (First Stipulation, R. 67) Those thirteen guilty plea convictions are valid in Alabama courts, but they will apparently be held invalid in the federal court below based on that court's misinterpretation of Alabama law. At the very least, confusion will reign supreme and much federal-state judicial friction will be needlessly generated.

The Important Policies at Stake

In reversing the standard set out by this Court in Bellotti v. Baird, 428 U.S. 132 (1976), the court below has adopted a rule which threatens the utility of abstention-certification and endangers the important policies behind it. This Court has said that abstention-certification "minimize[s] federal-state friction" and "avoids premature and perhaps unnecessary [federa] adjudication," Kusper v. Pontikes, 414 U.S. 51, 54-55 (1973), and "in the long run save[s] time, energy, and resources and helps build a cooperative judicial federalism." Lehman Brothers v. Schein, 416 U.S. 386, 391 (1974). As a different panel of the court below commented in Barnes v. Atlantic & Pacific Life Ins. Co., 530 F. 2d 98, 99 (5th Cir. 1976), "certification procedures such as Alabama has now are invaluable tools of cooperative judicial federalism."

The court below has taken the cooperation out of "cooperative judicial federalism." By ruling that federal courts should push aside important and possibly dispositive state law issues and grab any opportunity to exercise federal judicial powers, the court below has made the exercise of federal judicial power an end in itself. It has guaranteed years of needless federal-state judicial friction.

This court should grant certiorari to preserve, clarify, and strengthen the certification standard announced in Bellotti v. Baird, supra, and in order to reject the new rule adopted by the court below.

A DECISION ON THIS PETITION SHOULD BE HELD IN ABEYANCE UNTIL THE ALABAMA SUPREME COURT DECIDES A RELATED CASE

The case of Evans' co-defendant, Wayne Eugene Ritter, was argued and submitted to the Alabama Supreme Court on

March 16, 1981, after that case was remanded by this Court for further consideration in light of the Beck decision. See, Ritter v. Alabama, 100 S. Ct. 3044 (1980). The federal constitutional issues and the underlying state law questions in the Ritter appeal are identical to those in the present case, and the parties are represented by the same attorneys.[12]

For three reasons, this Honorable Court should hold any decision on this petition in abeyance until the Alabama Supreme Court issues its decision in the Ritter case. First, in deciding the Ritter case, the Alabama Supreme Court will necessarily address the state law questions which the federal court below refused to certify to it in this case. The answers the Alabama Supreme Court gives to those state law questions will either

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[12] See the January 27, 1981 letter Petitioners filed in the court below, which is reproduced as Appendix F, pp. 34a - 38a, infra.

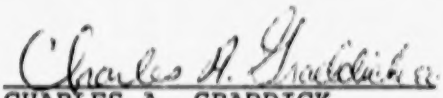
show that the federal court's refusal to certify was harmless error, or those answers will underscore the harm and confusion caused by the failure to certify. Secondly, if the Alabama Supreme Court holds that in view of the Beck decision Evans is entitled to a new trial as a matter of state law, that holding will moot not only this petition but this entire federal habeas proceeding.

Finally, if the Alabama Supreme Court rules in favor of the State and decides the federal constitutional issues differently than the federal court below, there will be a direct conflict between a federal court of appeals and a state court of last resort on an important federal constitutional issue, which will establish an additional ground for certiorari. See Rule 17.1(a).

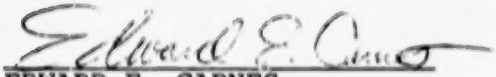
For all these reasons, Petitioners respectfully request this Honorable Court to hold in abeyance a decision on this

petition until the Alabama Supreme Court has issued a decision in the Ritter case.[13]

Respectfully submitted,



CHARLES A. GRADDICK
ALABAMA ATTORNEY GENERAL



EDWARD E. CARNES
ASSISTANT ALABAMA ATTORNEY GENERAL

Counsel Of Record

ADDRESS OF COUNSEL:

Assistant Attorney General Edward E. Carnes
250 Administrative Building
64 North Union Street
Montgomery, Alabama 36130
205/834-5150

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[13]Petitioners have filed in the Alabama Supreme Court a Motion to Expedite Decision in the Ritter case.

Petitioners will inform this Court as soon as the Alabama Supreme Court issues its Ritter decision.

CERTIFICATE OF SERVICE

I, Edward E. Carnes, a member of the Bar of the Supreme Court of the United States, do hereby certify that on this the 10th day of April, 1981, I did serve copies of this petition and the accompanying appendix on Respondent, by placing in the United States Mail, first-class postage prepaid, three copies properly addressed to each of the following counsel of record for Respondent:

Honorable John R. Carroll
Honorable Dennis N. Balske
1001 South Hull Street
Montgomery, Alabama 36104

Honorable Steven A. Feiss
2555 N Street N.W.
Washington, D.C. 20037

I further certify that I have served all parties required to be served.

Edward E. Carnes

EDWARD E. CARNES
ASSISTANT ALABAMA
ATTORNEY GENERAL